No. 01-20-00568-CV

IN THE FIRST COURT OF APPEALS
HOUSTON, TEXAS

SUNIL KUMAR MEHTA AND MEHTA INVESTMENTS, LTD.,
Defendants–Appellants

v.

MOHAMMED AHMED
Plaintiff-Appellee

Appeal from the 295th Judicial District Court of Harris County, Texas
Trial Court Cause No. 2017-84654

APPELLEE'S BRIEF

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ORAL ARGUMENT REQUESTED

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Statement of the Case

Nature of the case: This is an action for money damages stemming from the parties' dealings related to the West Oaks Mall and Macy's in West Houston. C.R. 1086–1106. Mohammed Ahmed ("Ahmed") sued Sunil Mehta and Mehta Investments, Ltd. (collectively, "Mehta") for breach of fiduciary duty, fraud, unjust enrichment, and imposition of a constructive trust as a result of Mehta's conduct in acquiring these properties. *Id.*

Course of Proceedings: This is an appeal from a four-day jury trial. The jury concluded that the parties formed an oral partnership and that Mehta breached his fiduciary duties as it relates to the West Oaks Mall. C.R. 3508–21. The jury also found that Mehta committed fraud and was unjustly enriched by his conduct as it relates to the West Oaks Mall. *Id.* The jury found no wrongdoing as to the Macy's. *Id.*

Judgment: The court entered judgment in the amount of $1,586,000 for breach of fiduciary duty and unjust enrichment related to the West Oaks Mall. C.R. 3634–35.

Statement Regarding Oral Argument

Ahmed believes that oral argument would assist this Court. Many of the arguments concern the legal and factual sufficiency of the evidence supporting the jury's verdict in Ahmed's favor that was developed over a four-day jury trial. Oral argument will best allow the Court to inquire about the unique facts of this case. In addition, some of Mehta's legal challenges rely on novel application of precedent and misapplication of the appellate standard of review. Oral argument may aid in resolution of these legal issues.

Issues Presented

The Final Judgment awards damages for breach of fiduciary duty (predicated on the existence of an oral partnership) and unjust enrichment. The following issues relate to the Final Judgment:

1. The evidence adduced over four days of testimony supports the statutory partnership factors. Does the record contain more than a scintilla of evidence to affirm the jury's verdict that Ahmed and Mehta formed a partnership to acquire, develop, and operate the West Oaks Mall?

2. A partner cannot usurp identified partnership opportunities after termination, including opportunities that have not fully come to fruition. Is Ahmed entitled to receive the value of his partnership interest in the West Oaks Mall—a wrongly usurped partnership opportunity?

3. The jury could reasonably find that Mehta obtained a benefit through illicit means that it would be unconscionable for Mehta to retain. Does the record contain sufficient evidence to affirm the jury's verdict that Mehta was unjustly enriched?

4. Because breach of fiduciary duty and unjust enrichment serve different purposes and address distinct harms, did the trial court correctly enter Final Judgment on both claims?

5. While a party cannot rewrite the terms of a deal through an equitable theory, the unjust enrichment damages awarded are consistent with the parties' oral partnership agreement. In addition, Ahmed partly performed and was precluded from fully performing by Mehta's wrongful conduct. Did the trial court correctly find that no bar to recovery for unjust enrichment exists?

6. A fiduciary relationship is not a prerequisite for disgorgement. Would reversing the partnership finding require setting aside the unjust enrichment damage award?

Only if the Court finds that the evidence does not support the partnership finding must it address the jury's fraud finding and award. Mehta raises the following issues regarding the fraud finding:

7. Representations about being partners, particularly with knowledge that the recipient believes that a partnership exists, have consequences. Such representations are material and allow a person to justifiably rely on them. Does the mere fact that a partnership is terminable-at-will negate—as a matter of law—any element of fraud?

8. Relatedly, does the fact that a partnership is terminable-at-will preclude the type of damages awarded?

9. The parties agreed to share in the profits of owning, running, and developing the West Oaks Mall. This Court has held that agreements to share profits from contemplated speculative deals in real estate do not fall within the Statute of Frauds. Did the trial court correctly find the Statute of Frauds inapplicable?

10. Once Mehta represented that he agreed to be partners with Ahmed, he had a duty to disclose his true intentions. Is the jury question on fraud, which recognizes this duty, proper?

Statement of Facts

This appeal stems from a judgment on a jury verdict. The evidence adduced at trial is viewed in the light most favorable to the verdict. The jury's credibility determinations, particularly when presented with wildly different versions of the facts, are afforded great deference.

While the facts start with Mehta's initial efforts to acquire the West Oaks Mall, and Ahmed enters the picture in middle, it is important to understand a bit about Ahmed from the outset. Ahmed embodies the American dream. He was born in Pakistan. 6 R.R. 90:5–92:16. After a stint in the merchant marines, he moved to Houston in 1985. *Id.* He started working as a waiter in hotels while flipping hamburgers at McDonald's at night. 6 R.R. 92:24–95:19. Ultimately, he saved enough to buy a convenience store. *Id.* Over time, Ahmed continued to buy businesses and today owns dozens of franchises, including Denny's, Jack-in-the-Box, and Cinnabon. 6 R.R. 94:18–95:23.

Ahmed is also experienced in real estate development, having developed shopping centers, an office building, apartments, and an industrial warehouse near the airport. 6 R.R. 97:15–98:3.

I. Mehta must make a cash offer on the West Oaks Mall to be competitive—but he lacks the cash.

A. Mehta learns of the opportunity to acquire the West Oaks Mall through an email blast and starts bidding.

At the center of this case is the West Oaks Mall, consisting of 1,032,092 square-feet of retail space sitting on sixty acres at the corner of Highway 6 and Westheimer in Houston. Pl.'s Ex. 52. In 2017, the mall generated $677,590 in guaranteed in-place income. *Id.* The appraisal district listed the mall's value at $27,359,032. *Id.*

On June 12, 2017, a real estate broker sent an email blast soliciting bids on the West Oaks Mall. 5 R.R. 138:5–19; Pl.'s Ex. 1. The email blast went out to eight hundred individuals and businesses. 5 R.R. 138:14–19. Bids were due on a short fuse, by June 22, 2017. 5 R.R. 138:22–25; Pl.'s Ex.1.

Mehta placed an offer of $1,000,000 plus assuming the existing note. R.R. 140:20–141:16; Pl.'s Ex. 5. Mehta's first offer "fell far short of market guidance," 5 R.R. 143:3–6, and the mall owner rejected it. 5 R.R. 142:8–14.

B. The seller sets a $10,000,000 target price for the West Oaks Mall.

The broker sent a follow up letter to bidders to help them refine their offers and set forth the seller's requirements. *See* 5 R.R. 145:12–148:17; 5 R.R.

150:22–25; Pl.'s Ex. 6. The seller set a target price of $10,000,000 with a 30-day closing period. Pl.'s Ex. 6.

The seller also stated a requirement "to better understand the source of funding for the proposed purchase" and requested that prospective buyers "provide financials . . . in the form of personal bank statements or audited financials," which were described as "crucial due diligence" items to the seller. 5 R.R. 151:8–24, Pl.'s Ex. 6.

Mehta believed that the target price represented a "great deal." 4 R.R. 36:16–21. The appraisal district listed the value in 2016 as $27,359,032, *see* Pl.'s Ex. 52, an amount which Mehta represented as the market value on a sworn financial statement. 7 R.R. 60:11–23; Pl.'s Ex. 43. The attractiveness of the asset was increased by the expectation that the vacant, separately owned, Macy's would likely become available for purchase as well (which it did in fall 2017). 5 R.R. 226:18–227:16; Pl.'s Ex. 47.

The trial evidence further confirmed that the mall was being offered for millions less than market value. Matt Deal, Ahmed's expert appraiser, opined that the value for just the raw land of the West Oaks Mall was $13,069,150. 5 R.R. 64:3–7. He also opined that the property was generating income, and that the revenue was a "bonus above the land" that would aid

in the future development. 5 R.R. 65:24–66:19. He conservatively opined that the present value of five years of the income stream totaled $1,670,000. *Id*. This value was indeed conservative given that Mehta reported a one-year profit from the West Oaks Mall (and vacant Macy's parcel) in 2018 of $1,100,000. 5 R.R. 66:20–23; Pl.'s Ex. 50.

C. Mehta approaches Community Bank for a loan.

Mehta commenced his hunt for the $10,000,000 by approaching his friend and banker, Morag McInnes, with Community Bank. 4 R.R. 33:8–38:4. Ms. McInnes had done business with Mehta for several years. 4 R.R. 32:5–33:7. According to Ms. McInnes, she had a good relationship with Mehta, so much so that Mehta said that she was "like a daughter" to him. 4 R.R. 33:8–13.

Ms. McInnes prepared a term sheet for a potential loan. 4 R.R. 37:14–39:8, Pl.'s Ex. 7. Before the bank could commit to a loan, however, it had to undertake due diligence, which would require many weeks to complete. 4 R.R. 43:7–19.

D. Mehta gives the seller his financial statement showing only $1,200,000 in available cash.

Mehta prepared a financial statement for the bank. 4 R.R. 43:20–44:19; Pl.'s Ex. 9. This document showed that Mehta had approximately $789,000 in cash available at Community Bank through his checking account and a line of credit. 4 R.R. 49:3–23; 5 R.R. 242:13–17; Pl.'s Ex. 9. The financial statement revealed that Mehta was otherwise largely illiquid, having total access to cash of less than $1,200,000. 4 R.R. 48:13–49:2.

Mehta provided this financial statement in response to the refinement letter, exposing his liquidity issues. Pl.'s Ex. 9. He never satisfied the requirement of providing audited financials. 5 R.R. 247:3–10.

E. Mehta's second offer requires too long a closing period.

On June 28, 2017, Mehta submitted a revised offer. Ex. 13; 5 R.R. 156:20–157:14. Mehta increased the purchase price to the seller's target of $10,000,000 as suggested. 5 R.R. 157:15–18. The new offer was based on bank financing, however, and required a lengthy closing period. *See* Pl.'s Ex. 13. Mehta proposed the following:

> Closing date: we have been advised by banks that it would require the appraisal, surveys and other documentation and they think the closing should realistically be sixty days.

Id. Mehta's request for a sixty-day closing aligns with what Ms. McInnes stated would be required to complete traditional bank financing. 4 R.R. 43:7–19.

The seller's broker quickly responded, telling Mehta that such a long closing period "would likely lose him the offer." 5 R.R. 160:17–162:16.

On June 29, 2017, Mehta submitted a $10,00,000, all-cash offer with a 20-day closing. 5 R.R. 165:10–167:13; Pl.'s Ex. 15. This offer put Mehta in a bind because he did not have the cash and had already disclosed that detail in his financial statement. *See* Pl.'s Ex. 9.

II. Mehta hustles to secure $10,000,000 cash.

Mehta began his quest for cash by again contacting Ms. McInnes. 4 R.R. 57:3–58:22. Mehta inquired whether she knew anyone who might have cash to loan since traditional bank financing was unavailable. *Id.*

Ms. McInnes had known Ahmed for many years, and they were friends. 4 R.R. 63:20–69: 6. She knew that Ahmed had a credit facility at the bank with over $10,000,000 in readily available cash. 4 R.R. 58:23–61:5; *see also* Pl.'s Exs. 2 and 3.

Ms. McInnes called Ahmed on Mehta's behalf. She recounted her call with Ahmed as follows:

A. [Ms. McInnes] So I called [Ahmed] up and I said:

> Well – I said: Look. One of my customers, he's trying to buy the West Oaks Mall, but he doesn't have the money to do it. Would you be interested in – in speaking to him? He's looking to – I think he was looking either – I think he said: To – that would lend him the money.
>
> And [Ahmed] said to me: Well, he said:
>
> Yeah. He says: I'm happy to talk to him. But he says: I don't want to be a hard money lender. I'd rather have, like, an equity position in it.

4 R.R. 58:8–18.

After relaying Ahmed's interest and comments to Mehta, Ms. McInnes connected them. 4 R.R. 58:20–22; 4 R.R. 75:7–76:7. Mehta later thanked Ms. McInnes for the introduction and said that the call went well. 4 R.R. 71:8–21.

III. Mehta contacts Ahmed, who has the cash but does not merely want to be a lender, and Mehta agrees to be partners.

Ahmed and Mehta first spoke over the phone on June 29, 2017. 6 R.R. 104:24–107:11. Ahmed told Mehta in this first conversation that he was interested in pursuing the opportunity only as a partner, not as a lender. 6 R.R. 106:3–107:11. Ahmed recounted:

A. [Ahmed] Mr. Mehta called me on June somewhere before lunch. And then, he asked me to – "You have a $10 million facility." So he wants to borrow $10 million to buy the mall.

> I said: Yes. Yes I do have.
>
> Do you have cash available?
>
> I said: Yes, I have cash available.
>
> He says: Would you lend the money?
>
> I said: I have already discussed with the banker. I'm not interested in lending money. I told the banker I'm only interested – and if you are interested too, you have a – partnership or agreement to do the joint venture.
>
> That's – that's what the first call I – I discussed with him.
>
> Then he says: So you can do the partnership?
>
> I says: Yes, we can [do] that. The only way we can do – of – I can give you $10 million unless we do the partnership together.

6 R.R. 106:3–24.

IV. Mehta and Ahmed firm up the details of their partnership over the coming days.

If Mehta had simply said he was only interested in borrowing the money, Ahmed would have understood. 6 R.R. 107:24–108:5. But that is not what happened. As detailed below, over the coming days, the parties had numerous phone conversations and in-person meetings through which they confirmed and solidified an agreement to be partners. Throughout, Mehta

never told Ahmed that he changed his mind about being partners or that he was looking for only a lender.

- **June 30, 2017**

The day after their first phone call, Ahmed and Mehta spoke in the morning, and then, at Mehta's invitation, Ahmed went to Mehta's office that afternoon for further discussions. 6 R.R. 109:1–14.

After meeting at Mehta's office, Ahmed and Mehta drove to the West Oaks Mall together. 6 R.R. 109:1–114:11. While on location, they negotiated more details of the partnership. Specifically, they discussed and agreed upon the ownership interests in the partnership. 6 R.R. 112:13–114:3. Ahmed initially proposed a 50/50 split. 6 R.R. 112:13–22. Mehta rejected that proposal. *Id.* Mehta then proposed a 65/35 split. *Id.* Ahmed agreed. *Id.*

Ahmed and Mehta also talked about acquiring the adjoining Macy's parcel if it came on the market recognizing that this parcel would be important to the overall development of the area. 5 R.R. 228:3–16. They agreed that the splits would be reversed if they were able to acquire it. 6 R.R. 113:5–114:4.

Ahmed requested that the parties put their agreement in writing. 6 R.R. 114:23–115:10. In response, Mehta said that this formality could be done

later; he said nothing to indicate that he would not partner with Ahmed. 6 R.R. 116:8–13.

Mehta also approved providing Ahmed the confidential offering memorandum on the West Oaks Mall. 6 R.R. 111:11–18; 4 R.R. 72:25–73:15; *see* Defs.' Ex. 48.

- **July 1, 2017**

Mehta called Ahmed early in the morning and invited Ahmed over to his house. 6 R.R. 118:3–22. Ahmed went to Mehta's house later that day for about an hour. 6 R.R. 118:25–122:8. The parties discussed their common experience in the merchant marines and exchanged other pleasantries. *Id.*

They again talked about the partnership. *Id.* They discussed the long-term plans and development opportunities for the West Oaks Mall. 6 R.R. 120:19–123:14. They discussed how Ahmed, with his extensive experience in the restaurant industry, *see* 6 R.R. 94:18–98:3, could "do whatever [he] want[ed] to do with the food business," and how Mehta, with his experience in retail, would do a market. 6 R.R. 120:19–121:17. Ahmed discussed a family entertainment center. *Id.* Because Mehta was unfamiliar with entertainment center concept, *see* C.R. 1180–81, the parties drove to a nearby similar business to see it. 6 R.R. 122:9–123:14.

Not once during this day, which the parties spent discussing the partnership, various development opportunities, and their future together, did Mehta disavow a partnership with Ahmed. 6 R.R. 124:8–125:1.

- **July 3 and July 4, 2017**

Ahmed and Mehta continued to discuss matters over the phone on July 3rd and the July 4th holiday.[1] 6 R.R. 125:2–127:12. During these conversations, Mehta requested the proof-of-funds letter from Ahmed. *Id.* Mehta requested that the letter be in his name only. *Id.* Ahmed responded by saying they were partners, so the letter should reflect that. *Id.* Mehta said nothing to deny or otherwise cast doubt on Ahmed's declaration of partnership. 6 R.R. 130:4–25.

The parties also discussed obtaining a written partnership agreement. *Id.* at 126:14–128:2. Mehta represented "that very soon" the parties will do so. *Id.*

[1] July 2, 2017 was a Sunday. *See* 6. R.R. 8:7–8 (taking judicial notice that July 1st was a Saturday).

V. Premised on the partnership, Mehta obtains the Community Bank proof-of-funds letter and forwards it to the seller to improve his chances.

Having secured Ahmed's consent based on the premise and agreement that they were partners, Mehta went to Ms. McInnes' office on July 5, 2017 to acquire the proof-of-funds letter. 4 R.R. 73:16–76:19. Ahmed had already discussed this letter with Ms. McInnes and authorized it. 4 R.R. 81:4–82:1; 6 R.R. 128:3–11.

Through her conversations with Ahmed and Mehta, Ms. McInnes understood that "they were talking about doing a partnership deal" and had heard this from both gentlemen. 4 R.R. 75:7–76:7. Neither Mehta nor Ahmed expressed to Ms. McInnes anything to the contrary. 4 R.R. 75:19–76:2.

At Ms. McInnes' office, Mehta requested that the letter be only in his name. 4 R.R. 77:10–78:16. Ms. McInnes refused:

> Q. . . . did he tell you how he wanted – what he wanted in the letter?
>
> A. I said to him, I said: I have to put both names on it. You know? You –
>
> And he says to me: Well, can you not do that.
>
> And I said: Well, I have to do that because you don't have the money. It's got to be in both names.

And he said he didn't want [Ahmed's] name on there.

Q. Did he say why?

A. Something to do with: I think the broker thought that it was him that was buying the West Oaks Mall so he didn't want his name on there.

And I said: Well, I can't do that because you know, obviously it's [Ahmed's] money.

And he said – I says: Well, you know – I says: You [are] doing a partnership.

He says: Well, can we put—can we maybe put into, like, the Mehta group.

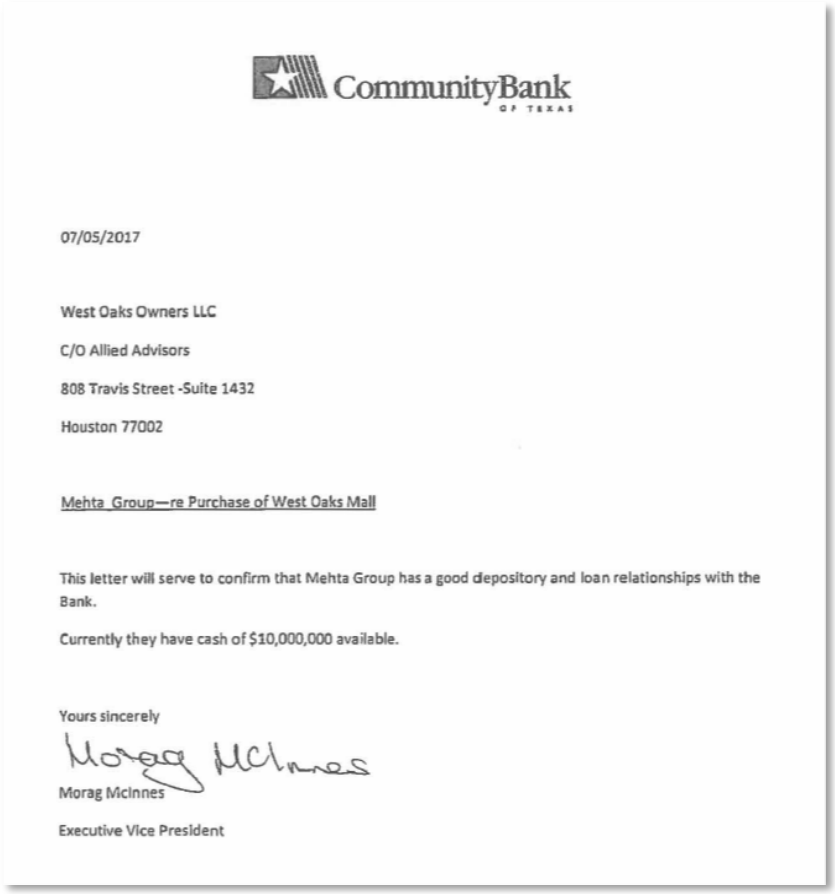
And I thought about it and I thought: Well, okay. If they're doing a partnership together, then the new entity would be called the Mehta group. And that was the way that I setup the letter.

And I said: They have this money in the bank, meaning both of them.

Q. So why weren't you willing to provide the letter in Mr. Mehta's name alone?

A. Because he didn't have the money.

4 R.R. 77:15–78:19; *see also* 4 R.R. 99:1–19. Reflecting that Ahmed and Mehta—collectively—had sufficient funds at Community Bank (and only Community Bank, 4 R.R. 82:2–8), she drafted the letter in the name of "the Mehta Group," reflecting that "they" had sufficient cash available:



CommunityBank OF TEXAS

07/05/2017

West Oaks Owners LLC

C/O Allied Advisors

808 Travis Street -Suite 1432

Houston 77002

Mehta Group—re Purchase of West Oaks Mall

This letter will serve to confirm that Mehta Group has a good depository and loan relationships with the Bank.

Currently they have cash of $10,000,000 available.

Yours sincerely

Morag McInnes

Executive Vice President

See also 4 R.R. 99:1–19; Pl's. Ex. 22.

Ms. McInnes further explained:

Q. . . . when you typed this letter and referenced the Mehta Group, tell the jury who you meant to represent within the Mehta Group?

A. Well, within the Mehta Group, I – I – I knew they had been discussing the partnership, so it was [Ahmed] and Mr. Mehta. And it was the funds that they had together in the bank account.

So together they had $10 million dollars combined. But it was mostly [Ahmed's] money.

4 R.R. 79:9–17. Ms. McInnes deliberately wrote that the Mehta Group had good depository "relationships," using the plural form of the word, to indicate that "Mehta Group" represented both Ahmed and Mehta. 4 R.R. 79:23–80:15.

No plausible explanation exists for the statement in the letter that "**they** have **cash** of $10 million available" at Community Bank other than it represented Ahmed's and Mehta's cash collectively, just as Ms. McInnes, the letter's author, testified, because Mehta admitted that he did not have the cash at Community Bank, even across his companies:

> Q. Your group of companies did not have $10 million in available cash at Community Bank as of July the 5th of 2017, did they?
>
> A. Yes, sir.
>
> Q. Yes, they did? Or yes, you agree that they did not?
>
> A. They did not have it that day.

6 R.R. 55:18–24.

Mehta left the bank with the letter and immediately sent it to the seller to support the offer. Pl.'s Exs. 22 and 23. The cover email affirmatively states that the letter represents "the cash available in **one** of **our** banks." Pl.'s Ex. 23. "Our" either includes Ahmed or it is false.

VI. After secretly securing other financing, Mehta dumps Ahmed.

The broker contacted Mehta to preliminary award him the West Oaks Mall **after** providing to and discussing the Community Bank letter with the seller. 5 R.R. 179:7–18; Pl.'s Ex. 23. Prior to the call, all Mehta knew was that the seller had requested that he provide audited financials and proof of funds (neither of which he had provided), *see* 5 R.R. 215:11–16; Pl.'s Ex. 6, he had bid $10,000,000 cash, *see* Pl.'s Ex. 15, and he had disclosed that he did not have the cash. *See* 5 R.R. 242:13–17; Pl.'s Ex. 9.

Mehta and Ahmed spoke on July 5th. 6 R.R. 129:14–23. According to Ahmed, "Mr. Mehta told [him] that – that these – the offer is – is accepted. They have received the proof of funds [letter]. They have accepted the offer, and then they want to proceed with that." *Id.* Again, at no time did Mehta indicate that he was not going to be partners with Ahmed:

> Q. At any time prior to providing the proof of funds there. Prior to July 5th, did Mehta ever tell you: No, Mr. Ahmed, I don't want to be partners with you?
>
> A. No.
>
> ***
>
> Q. Did he ever tell you as of – had he told you by July 5th of 2017 that he already had it in his mind that he was not going to be partners with you?

A. Whatever in his mind, I can't read it. But he never discuss anything not to have a partnership with me.

6 R.R. 130:4–25.

The day after Mehta told Ahmed that the offer was accepted, Ahmed went to Mehta's house. 6 R.R. 132:25–133:15. They *again* discussed the partnership, the future of the West Oaks Mall, and how they were going to redevelop it. *Id.* Ahmed *again* noted that the parties should put their agreement in writing, and Mehta *again* said they would do so. *Id.* Mehta did not deny the partnership nor retract his prior representation that he would enter a written partnership agreement. *Id.*

After this last meeting, Mehta then went silent. 6 R.R. 132:25–134:6.

On July 17th, Mehta informed Ahmed over the phone that he did not want to be partners. 6 R.R. 137:9–138:9.

Unbeknownst to Ahmed, Mehta never stopped searching for other sources of cash. 6 R.R. 75:15–77:9. Mehta contacted several lenders after agreeing to partner with Ahmed and obtaining and using the Community Bank letter based on that premise. *Id.* Ultimately, Mehta cobbled together the money from a variety of sources including mortgaging his house, borrowing money from his brother, and securing a loan from a friend. 6 R.R. 79:8–80:12.

Mehta never corrected his representations to the seller, nor did he advise that the $10,000,000 of the "Mehta Group" at Community Bank would not be used as the source of funds for the closing. 7 R.R. 65:3–17.

VII. Mehta attempts to suborn perjury from the banker who provided the Community Bank letter.

After the lawsuit was filed, Mehta requested a meeting with Ms. McInnes. 4 R.R. 85:2–14, Ex. 49. The two met, 4 R.R. 85:15–24, at which time Mehta explained that Ahmed had sued him, and that Ms. McInnes might be called as a witness. 4 R.R. 86:4–89:14. Mehta admitted that he had in fact used the proof-of-funds letter. 4 R.R. 120:22–121:24. Mehta then attempted to suborn perjury:

> A. . . . [Ms. McInnes] So he said to me: You know, Morag, he said: The letter that you gave me, he said: Perhaps we can just kind of keep that between us. And I said: No, I can't do that. I said: Because if I – if I get a subpoena, I says: I'll have to tell the truth:

4 R.R. 87:4–9.

Given the gravity of the illicit request made of Ms. McInnes, Mehta plainly appreciated that the letter was a problem for him, making it difficult to deny Mr. Ahmed's involvement and the agreement to be partners.

VIII. Mehta repeatedly and categorically denies the specific accounts provided by Ahmed (and Ahmed's witnesses) in such a manner as to allow the jury to believe that Mehta was lying.

As discussed herein, the jury was fully entitled to credit Ahmed's (and his supporting witnesses') account of the facts, and to disbelieve Mehta's contrary account. But the testimonial conflicts in this case were often not mere differences in opinion, perception, or recollection which could be justified as innocent differences. Rather, the jury heard ample evidence which, if credited in Ahmed's favor as the jury apparently did here, demonstrates that Mehta was repeatedly lying in several key areas of his testimony at trial. *See, e.g.*, *Browne v. State*, 483 S.W.3d 183, 196 (Tex. App.—Austin 2015, no pet.) ("The conflicts between Browne's testimony and Anthony's testimony were sufficient to support the inference that Browne was lying."); *Bradley v. State*, 359 S.W.3d 912, 919 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd).

A few examples are illustrative. Mehta flatly denied Ms. McInnes' testimony concerning their June 29, 2017 phone call:

> Q. Did you – in that call, did you ask Ms. McInnes if she knew anybody who might have $10 million in cash in order to finance the acquisition of the West Oaks Mall?
>
> A. Not correct.

Q. All right. You heard her testify to that, right?

A. Yes.

Q. All right. Is she lying?

A. That's her testimony.

Q. All right. You – you say that never happened?

A. Yes.

5 R.R. 252:11-22.

Regarding Ahmed's and Mehta's first phone call on June 29, 2017—concerning which Ahmed testified that he told Mehta that he did not want to be a lender and was interested only in a partnership—Mehta flatly denied Ahmed's account:

Q. Was there – on the first day that you spoke, June the 29th of 2017, was there – was there any – did Mr. Ahmed tell you during that phone call that he was not interested in being a lender?

A. That never came up.

***

Q. All right. Did Mr. Ahmed indicate to you in any way that he was not interested in being a lender?

A. No, no.

Q. He never said anything like that to you —

A. No.

Q. —on June the 29th of 2017?

A. No.

Q. Correct?

A. No.

Q. Not correct? Or no he never said it?

A. He never said that.

5 R.R. 261:9–262:17.

Regarding Ahmed's claim that they discussed and agreed upon a partnership with a 65/35 split, Mehta again simply denied that anything like that had ever happened:

Q. Okay. So is it your testimony that as you sit here today, you and Mr. Ahmed never discussed percentage splits?

A. Yes, sir.

***

Q. . . . Mr. Mehta, I'm just trying to —I just want to make sure that I — that I get your testimony on the record. Did you or did you not ever, in the history of the time that you were dealing with Mr. Ahmed, discuss potential percentage splits with regard to a partnership.

A. No, sir.

Q. Never happened?

A. No.

5 R.R. 270:7–25.

Similarly, Mehta denied that, as Ms. McInnes clearly testified, Mehta attempted to get Ms. McInnes to fraudulently draft the proof-of-funds letter so as to include only Mehta's name:

Q. . . . I want to make sure the record is clear on this. Is it your testimony that — that contrary to what Ms. McInnes testified, she did not tell you that — that the letter should be put in both your name and Mr. Ahmed's name. You're saying she never said that to you, correct?

A. Yes.

Q. And likewise, she never made—she never told you that the reason that she wanted to do that because it was mainly Mr. Ahmed's money. You're saying she never said that either?

A. No.

Q. Correct, she never said that?

A. Yes, she never.

6 R.R. 47:24–48:13.

And with regard to Ms. McInnes' clear and unequivocal testimony that, after the litigation was commenced, Mehta attempted to persuade her

to conceal the letter from discovery in the litigation, Mehta again denied that it had ever occurred, and claimed that it was a "fabricated" story:

> Q. Now, you – you were here during Ms. McInnes – Ms. McInnes' testimony when she said that you asked her to keep that proof-of-funds letter just between the two of you. Did you do that, sir?
>
> A. No, sir.
>
> Q. You never asked her to conceal –
>
> A. No.
>
> Q. —or hide the letter in any way?
>
> A. No.
>
> Q. So she wouldn't have had any occasion to respond to you and say: Mr. Mehta, I can't do that. And if I'm called before, I'll have to tell the truth. Did she say anything like that?
>
> A. That's not true.
>
> Q. It just didn't happen[]?
>
> A. No.
>
> Q. That's a fabricated conversation?
>
> A. Yes.

6 R.R. 86:13–87:5.

These are just a few examples of many of directly conflicting testimony. Given the nature of the conflicts and Mehta's numerous

categorical denials, the jury was more than entitled to believe that Mehta was simply continuing a pattern of deception concerning this entire event, even into the trial itself.

Summary of the Argument

The jury heard two wildly different versions of events from Ahmed and Mehta. After sitting through four days of testimony, weighing the evidence, and making credibility determinations, the jury plainly believed Ahmed and not Mehta.

The jury found that (i) Mehta and Ahmed formed a partnership, (ii) Mehta breached his fiduciary duty by usurping the partnership opportunity, (iii) Mehta was unjustly enriched by his scheme, and (iv) Mehta's deception constituted fraud.

The record contains legally and factually sufficient evidence to support the jury's findings that Ahmed and Mehta formed a partnership. While Mehta's testimony certainly offered a "different" version of events, the jury believed Ahmed.

The parties' conduct is consistent with, and supports, Ahmed's testimony that a partnership existed. Their numerous in-person meetings and phone calls discussing the partnership corroborate an agreement to be

partners. And, of course, the Community Bank proof-of-funds letter procured by Mehta was entirely premised on a partnership with Ahmed. Mehta's affirmative conduct in procuring this much-needed letter and his use of it to clinch the deal is consistent with his outward representations of partnership to Ahmed. The partnership finding is supported and must stand.

Notably, if the partnership finding stands, Mehta does not contest that his conduct constituted a breach of his fiduciary duties, which is telling.

The jury's unjust enrichment finding is also supported. The seller requested that Mehta demonstrate his ability to close on the West Oaks Mall. But Mehta had already disclosed that he lacked the cash. Mehta was awarded the property only **after** submitting the proof-of-funds letter to the seller for consideration. Furthermore, the seller could have backed out of the deal at any time. Thereafter, Mehta continued his deception with the seller, hiding the fact that the cash at Community Bank would not be the source of funds for closing, even though the source of funding was a critical due diligence item for the seller.

Mehta's agreement to be partners with Ahmed also benefitted Mehta by providing Mehta a source of cash in the event he was unsuccessful

surreptitiously locating other funding. The fact that he was still seeking other sources of financing does not undercut the existence of a partnership; instead, given his other conduct, the jury could have reasonably concluded that his self-dealing merely evidences a blatant disregard for the partnership duties owed to Ahmed.

Finally, Mehta's state of mind and appreciation of wrongdoing explains why, after litigation had started, he brazenly tried to suborn perjury from Ms. McInnes concerning the letter and to conceal its existence. No basis exists to disturb the jury's conclusion that Mehta was unjustly enriched.

Part II of Mehta's brief (which assumes that the partnership finding stands) consists of legal challenges to the damages. Mehta incorrectly reasons that Ahmed is not entitled to receive the value of his partnership interest because the partnership was terminable-at-will. But partners owe each other fiduciary duties after termination as to existing partnership opportunities. Mehta used the partnership to obtain the Community Bank letter, which he sent to the seller and used to bolster his offer by showing a source of funds. Mehta benefitted from the partnership; he cannot declare the partnership over and usurp existing partnership opportunities.

Next, the judgment does not violate the one satisfaction rule because breach of fiduciary duty and unjust enrichment serve different purposes and relate to different harms. And while unjust enrichment cannot be used to rewrite unfavorable contract terms, that rule is inapplicable here.

In sum, the jury's partnership, breach of fiduciary duty, and unjust enrichment findings are supported by the evidence, and Mehta's legal challenges are meritless. The Final Judgment should be affirmed.

Ahmed also prevailed on his fraud claim. In unlikely event that this Court will need to consider it, none of Mehta's arguments provide any basis to set aside the fraud finding or damages.

Standard of Review

In a legal sufficiency review, courts "consider the evidence in the light most favorable to the jury's findings, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Eagle Oil & Gas Co. v. Shale Exploration, LLC*, 549 S.W.3d 256, 269 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). "A party that challenges the legal sufficiency of a finding on which it did not bear the burden of proof must show that no evidence supports the jury's finding." *Id.*

Moreover, "[j]urors are the sole judges of the credibility of the witnesses and the weight to give their testimony." *City of Keller*, 168 S.W.3d at 819. "They may choose to believe one witness and disbelieve another." *Id.* "Reviewing courts cannot impose their own opinion to the contrary." *Id.* "If there is more than a scintilla of evidence to support the challenged finding" the reviewing court "must uphold it." *Ginn v. NIC Blgd. Sys., Inc.*, 472 S.W.3d 802, 831 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

In a factual sufficiency review, courts review "the record in a neutral light and set aside the jury's verdict only if it so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Eagle Oil & Gas Co.*, 549 S.W.3d at 269 (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)); *see also Ginn Bldg. Sys. Inc.*, 472 S.W.3d at 831.

Questions of law are reviewed de novo. *Eagle Oil & Gas Co.*, 549 S.W.3d at 267.

Argument

Mehta divides his argument into two parts. Part I addresses whether the record contains legally and factually sufficient evidence to support the jury's answers. Mehta makes some pure legal challenges as well. Part II addresses damages if the partnership and breach of fiduciary duty finding are found to be supported by the record (which they are). Ahmed will address the arguments in this same order.

I. The evidence supports the jury's finding that the parties formed a partnership.

A partnership is simply "an association of two or more persons to carry on a business for profits." Tex. Bus. Org. Code § 152.051(b). That is precisely what Ahmed and Mehta agreed to do—they agreed to jointly acquire, develop, and run the West Oaks Mall. *See* 6 R.R. 119:16–121:19; *see also Sewing v. Bowman*, 371 S.W.3d 321, 331 (Tex. App.—Houston [1st Dist.] 2012, pet dism'd) (finding that a partnership existed to acquire and develop real estate).

The Texas Business Organizations Code sets forth five factors for determining the existence of a partnership:

(1) receipt or right to receive a share of profits of the business;

(2) expression of an intent to be partners in the business;

(3) participation or right to participate in control of the business;

(4) agreement to share or sharing:

(A) losses of the business; or

(B) liability for claims by third parties against the business; and

(5) agreement to contribute or contributing money or property to the business.

Tex. Bus. Org. Code § 152.052.

The code "does not require proof of *all* of the listed factors in order for a partnership to exist." *See Ingram v. Deere*, 288 S.W.3d 886, 896 (Tex. 2009) (emphasis in original). Rather, the statute "contemplates a less formalistic and more practical approach to recognizing the formation of partnership." *Id.* at 895.

Courts apply a "totality of the circumstances" test, considering all the evidence and the various factors together. *Id.* at 898. Evidence of none (or just one) of the factors is indicative of no partnership, whereas evidence of all five factors is conclusive evidence of a partnership. *Id.* For cases in between these two extremes, the fact finder determines whether a

partnership existed. *See e.g.*, *Houle v. Casillas*, 594 S.W.3d 524, 551 (Tex. App.—El Paso 2019, no pet.) (holding that the record contained evidence of three of the five partnership factors and, as such, summary judgment disposing of a breach of fiduciary duty claim was improper); *GR Fabrication, LLC v. Swan*, No. 02-19-00242-cv, 2020 WL 2202325, at *8 (Tex. App.—Fort Worth May 7, 2020, no pet.) (affirming a jury verdict finding the existence of a partnership with evidence of one factor missing). Here, although not essential to support the jury's ultimate finding of a partnership, there is evidence supporting each of the five factors.

A. The parties agreed to share profits.

The parties agreed to share in the profits of the venture. 6 R.R. 109:1–114:11. The partnership's purpose was to own, operate, and develop the West Oaks Mall. 6 R.R. 120:19–123:14. Ahmed and Mehta discussed the future potential for development of the West Oaks Mall, discussed an eventual refinancing, and, discussed their ownership share therein. 6 R.R. 109:1–123:14.

Ahmed initially proposed a 50/50 ownership split, which represents the right to share in the profits. 6 R.R. 112:13–22. Mehta, however, suggested a 65/35 split in his favor that Ahmed accepted. *Id.* The fact that the parties

discussed—and negotiated—the ownership split is evidence of an agreement to share profits. *See Houle*, 594 S.W.3d at 548 (discussing that "although the partnership ended before any profits were shared," evidence existed that the parties agreed to share profits when earned).

Throughout his brief, Mehta first vaguely asserts that the parties only had an "agreement to agree." *See* Appellants' Br. at 33. Mehta is wrong. The parties reached a definite, specific agreement: a 65/35 split. 6 R.R. 112:13–114:3.

Moreover, Mehta's argument conflates testimony about the fact that Mehta kept stringing Ahmed along in terms of reducing the oral agreement to be partners to writing and the specific agreement to share in profits. Such a characterization is inconsistent with Mehta's testimony wherein he defiantly and repeatedly denied that conversations regarding being partners ever occurred. *See* 5 R.R. 262:18–263:4; 264:18–265:1; 265:23–266:4; 267:10–16.[2] In any event, because partnerships can be oral, the fact that the parties did not execute a written partnership is immaterial (in fact, it only helps show that Mehta continued to deceive Ahmed with his ongoing fraud). *See Sewing*,

[2] *See also supra* Statement of Facts, Part VIII.

371 S.W.3d at 339; *Houle*, 594 S.W.3d at 547; *see also e.g.*, *Street v. Grossman*, No. 01-91-00086-cv, 1991 WL 251215, at *3 (Tex. App.—Houston [1st Dist.] Nov. 27, 1991, no writ) (discussing that a party who promises to execute a writing may be estopped from avoiding the agreement on the basis of a lack of written agreement) (citing *"Moore" Burger, Inc., v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1972)). The existence or non-existence of a written agreement does not alter the oral agreement the parties reached regarding sharing profits.

Mehta also attempts to analogize partnership formation to contract formation and claims that there was not "a meeting of the minds" on the splits (or other terms). Given the testimony, this is false. Furthermore, this Court has rejected analogizing partnership formation to contract formation. *See Sewing*, 371 S.W.3d at 332. Instead, courts are to apply the totality of the circumstances test as discussed in *Ingram*. *Id.* ("[W]e conclude that, in regard to [plaintiff's] partnership claim, [plaintiff] need not prove each element establishing the existence of a contract.").

Of course, Mehta also denies making these statements or reaching this agreement. But "[t]he jury is the sole judge of the witnesses' credibility and the weight to be given to their testimony." *Id.* at 331 (citing *Golden Eagle*

Archery, Inc. v. Jackson, 116 S.W.3d 757, 761 (Tex. 2003)). Despite Mehta's repeated protestations and denials, the jury simply believed Ahmed's version of events over Mehta's. *See JSC Neftgas-Impex v. Citibank N.A.*, 365 S.W.3d 387, 406 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (discussing where a "jury could have reasonably discredited" certain testimony).

B. Both parties expressed an intent to be partners.

"When analyzing expression of intent under TRPA, courts should review the putative partners' speech, writings, and conduct." *Ingram*, 288 S.W.3d at 898–900. "Courts should only consider evidence not specifically probative of the other factors." *Id.* at 900; *see also Nguyen v. Hoang*, 507 S.W.3d 360, 372–73 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

From the beginning, Ahmed clearly said that he did not want to be a lender and was interested only in a deal as a partner. 4 R.R. 58:8–18. Ahmed reiterated this point to Mehta when they first spoke, and Mehta agreed to do a deal as partners. 6 R.R. 106:3–107:11.

The parties' conduct thereafter corroborates an agreement to be partners. They were in near constant contact over the coming days—most often with Mehta contacting Ahmed—speaking numerous times over the

phone and meeting in person on multiple occasions. 6 R.R. 109:1–114:11, 6 R.R. 118:3–123:14, 6 R.R. 125:2–127:6. The jury could infer from Mehta's continued calls to Ahmed, and various meetings with Ahmed, that they had agreed to move forward on Ahmed's only acceptable terms—i.e., as partners. *See e.g.*, *Malone v. Patel*, 397 S.W.3d 658, 673–78 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (considering the circumstantial evidence supporting the existence of a partnership).

Glaringly inconsistent with his repeated denials on the stand, Mehta actively leveraged his agreement with Ahmed in order to secure the July 5th Community Bank letter, which he knew was strictly provided based on the premise of the partnership. 4 R.R. 77:15–78:19; 4 R.R. 99:1–19; 6 R.R. 125:2–127:16. In other words, but for the partnership, Ahmed would not have allowed, 6 R.R. 139:3–16, and Ms. McInnes would not have provided, the letter. 4 R.R. 77:15–78:19; 4 R.R. 99:1–19. As Ms. McInnes testified:

> A. [Ms. McInnes] I wanted to do it in joint names.
>
> And [Mehta] said: He didn't want [Ahmed's] name on there.
>
> So, you know, I said: Well, you're talking about forming a partnership.
>
> He says: Yes.

4 R.R. 99:6–12. The letter was specifically drafted to reflect their association as partners. 4 R.R. 79:9–17. All this was expressly stated to Mehta, who proceeded without objection to secure it. 4 R.R. 77:15—78:19; 99:1–19. Once in his possession and with full appreciation of its meaning, Mehta provided it to the seller to induce the seller to accept the offer. Pl.'s Exs. 22 and 23. Although Mehta cagily continued looking for other funding sources and deceived the seller as to the source of funds, this does not mean that Mehta did not represent that he was Ahmed's partner to secure the letter. Rather, as the jury determined, his conduct is indicative of a willingness to wrongfully usurp the opportunity for himself.

Finally, Mehta's shameful conduct did not cease after litigation commenced, when he attempted to suborn perjury from Ms. McInnes. 4 R.R. 86:4–87:16.

Mehta's arguments that the record does not contain legally or factually sufficient evidence to support this factor are meritless. Mehta first mischaracterizes the testimony to give the appearance that somehow Ahmed agreed that no partnership was formed. *See* Appellants' Br. at 37. These snippets are taken out of context and primarily relate to the non-

existence of a *written* partnership agreement, as the jury plainly understood.

Ahmed, however, also testified as follows:

> Q. Based on what Mr. Mehta had told you over the course of time that you were dealing with him, did you believe in your mind that the two of you were partners?
>
> A. Yes.
>
> Q. Did you give him permission for the proof-of-funds letter because of all the things that he was telling you?
>
> A. Yes.
>
> Q. Did that include the agreement to be partners?
>
> A. Yes.
>
> ***
>
> Q. Mr. Ahmed, as you sit here today, do you believe that the words, the words that you said to Mr. Mehta and the words that Mr. Mehta said to you were enough for the two of you to become—to become partners?
>
> A. Yes.
>
> Q. Did Mr. Mehta promise to you that he would sign a written document putting the terms of the partnership you had formed into writing?
>
> A. Yes, he did.

Q. And even though you don't have a written partnership agreement, did you believe that you were already partners with Mr. Mehta?

A. Yes.

6 R.R. 139:3–15; *Id.* at 209:7–20. This testimony demonstrates that Ahmed intended to form a partnership (and believed he was in one), although they had not yet reduced their existent partnership to writing. On this issue, there is no actual conflict in Ahmed's testimony, and even if there were an apparent conflict, the jury gets to resolve that conflict and could have easily done so to reach their finding that a partnership existed. *See Gregan v. Kelly*, 355 S.W.3d 223, 228–29 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (noting that jurors are permitted to resolve testimonial conflicts); *see also Eagle Oil & Gas Co.*, 549 S.W.3d at 269 ("Jurors are entitled to resolve inconsistencies in witness testimony" including those resulting from "internal contradictions in the testimony of a single witness").

This court has rejected the very argument that Mehta makes here about one piece of testimony (taken out of context) being the proverbial "nail in the coffin." Appellants' Br. at 37. In *Gregan*, the defendant offered conflicting testimony about the existence of a fiduciary relationship. *Gregan*, 355 S.W.3d at 228. The plaintiff urged (as Mehta does here) that one of defendant's

statements that such a relationship existed was "tantamount to a judicial admission." *Id.* The court rejected that argument and discussed that the jury gets to resolve any conflicts in testimony. *Id.* at 229. Notably, despite the alleged "admission," the court held no fiduciary relationship existed. *Id.* at 231.

Next, Mehta incorrectly attempts to make it appear that the only evidence about intent is Ahmed's "mere personal belief" that they were partners. The record—viewed in the light most favorable to Ahmed—contains significantly more evidence than Ahmed's belief. From the moment Ahmed heard of this opportunity, he was clear he did not want to be a lender. 4 R.R. 58:8–18. He made this point to Ms. McInnes, *id.*, and reiterated this point to Mehta. 6 R.R. 106:3–24. Mehta agreed in the first phone call that Ahmed would be a partner. *Id.* The numerous phone calls and in-person meetings the parties had over the ensuing days is strong evidence that along the way the parties reached an agreement on this central point. 6 R.R. 109:1–114:11; 6 R.R. 118:3–121:25; 6 R.R. 125:2–127:6. The parties' conduct is highly relevant to analyzing this factor. *Ingram*, 288 S.W.3d at 898–900.

The Community Bank letter is objective proof that Mehta outwardly represented that he was partners with Ahmed and proceeded on that basis.

Ms. McInnes issued the letter only because of the partnership and told Mehta that explicitly. 4 R.R. 79:9–17; 4 R.R. 99:6–12. And the only way the letter makes sense is that references **both** Ahmed's and Mehta's cash. *See* 6 R.R. 55:18–24.

Finally, Mehta points to his own testimony as negating the existence of a partnership. But, of course, the jury is free to disregard that testimony, and did. *See Am. Motorists Ins. Co. v. Volentine*, 867 S.W.2d 170, 174 (Tex. App.—Beaumont 1993, no writ) ("We should also note that it is the sole province of the trier of fact who has the opportunity to observe the demeanor of the witnesses on the stand, to judge their credibility, to weigh their given testimony, to resolve conflicts in the testimony of one witness with the testimony of another witness, and to believe part of a witness' testimony and disregard other portions thereof."). Mehta was impeached repeatedly at trial on a variety of matters. *See e.g.*, 6 R.R. 10:8–13:25; 6 R.R. 14:7–15:16; 7 R.R. 54:12–60:23. The jury did not buy his story.

C. The parties agreed that they would control and run the business in their respective areas of expertise.

The parties discussed that both would run, operate, and develop the West Oaks Mall. 6 R.R. 120:19–123:14. They agreed to jointly run and

redevelop the West Oaks Mall within their respective area of expertise. In addition to his financial wherewithal, Ahmed, with his extensive experience in the restaurant industry, could "do whatever [he] want[ed] to do with the food business." 6 R.R. 120:19–121:17; *see also Houle*, 594 S.W.3d at 550 (finding evidence of the control factor where the parties controlled different aspects of the business). Thus, Mehta's argument that "the exercise of authority was never discussed" is not supportable on this record, and evidence exists supporting this factor. *See Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (discussing inferences that the jury can draw from the evidence).

Mehta highlights assorted details, such as Ahmed not writing checks, hiring or firing any employees, and that the partnership had no bank account as evidence of a lack of control. *See* Appellees' Br. at 45. As an initial matter, the evidence shows that the parties agreed that Ahmed would have authority to make "executive decisions," and, therefore, these points are in no way determinative of the issue. *See Ingram*, 288 S.W.3d at 901; *see also Malone*, 397 S.W.3d at 677 (noting that "evidence of input into executive decisions" is "evidence of control"). In any event, Mehta fundamentally ignores that Mehta's breach of fiduciary duty caused Ahmed's inability to exercise actual control. It is disingenuous to argue that Ahmed lacked

control because of Mehta's breach, and in the next breath claim that this is evidence that there was no partnership. *See e.g.*, *Maykus v. First City Realty & Fin. Corp.*, 518 S.W.2d 887, 893 (Tex. App.—Dallas 1974, no pet.) (discussing that partners owe each other duties even after termination).

The testimony shows that the parties discussed responsibilities would be divided, and that Ahmed would have authority to run the venture within in his specific sphere of expertise, which is corroborated by Mehta going with Ahmed to investigate potential restaurant opportunities proposed by Ahmed. 6 R.R. 122:9–123:14. This constituted sufficient evidence of control.

D. By agreeing to be partners and agreeing to their interests, the parties agreed to share loses.

The jury heard clear, direct evidence that the parties agreed to a partnership split of 65/35. 6 R.R. 112:13–114:3.

Mehta argues that sharing losses was not discussed because the parties did not specifically discuss whether they were going to form a general or limited partnership. *See* Appellants' Br. at. 47. The default rule is that parties form a general partnership and share losses. *See* Tex. Bus. Org. Code § 152.202.

The Texas Business Organizations Code also states that "an agreement by the owners of a business to share losses is not necessary to create a partnership." *Id.* at §152.052(c). Even if the evidence on this factor were slight, evidence nonetheless exists and, as stated above, no one factor is dispositive. For example, in *Houle*, the court found the evidence of sharing losses missing, but still concluded that, based on the totality of the circumstances, the evidence raised a fact issue regarding the existence of partnership. *Houle*, 594 S.W.3d at 550.

E. Ahmed contributed the availability of his cash to the partnership.

Ahmed contributed to the partnership by allowing Mehta to use his financial standing with Community Bank to obtain the proof-of-funds letter, which Mehta sent to the owner of the West Oaks Mall in support of his offer. 5 R.R. 179:7–18; Pl.'s Exs. 22 and 23. Ahmed also agreed to and was ready, willing, and able to contribute money and time. 6 R.R. 107:8–11 (telling Mehta that "if you do a partnership agreement with me to acquire the mall, my money is available").

Mehta misapplies this factor, and his argument would lead to a perverse result. Mehta focuses exclusively on the fact that Ahmed did not,

in the end, assist with the purchase of the West Oaks Mall. This argument, however, is just another way of asserting that because Mehta breached his fiduciary duty and usurped the West Oaks Mall opportunity for himself, that this is evidence that no partnership existed. The jury, however, could have concluded that the only reason that Ahmed did not contribute cash as promised to the West Oaks Malls is that Mehta breached his fiduciary duty and acquired it for himself.

Moreover, this element is specifically listed as an "*agreement to* contribute money *or* contributing money." Tex. Bus. Org. Code § 152.052(a)(5). Ahmed was ready, willing, and able "to contribute money" to the venture. R.R. 107:8–11. Putting aside the letter evidencing Ahmed's contribution of his access to cash at Community Bank—which is a tangible contribution to the partnership and supported Mehta's efforts—Ahmed's commitment to contribute his cash satisfies this element.[3]

[3] Courts also recognize that even intangible contributions, such as time and reputation, may satisfy this element. *See Houle*, 594 S.W.3d at 550–551. Ahmed agreed to and intended to help run the West Oaks Mall, 6 R.R. 120:19–121:17, which further supports this factor.

F. Considering the totality of circumstances, the jury's conclusion is supported.

Based on the totality of the circumstances, the record contains legally and factually sufficient evidence to support the jury's conclusion that a partnership was formed. *See Ingram*, 288 S.W.3d at 898; *Houle*, 594 S.W.3d at 550. Evidence supports the factors; no evidence conclusively negates finding the parties formed a partnership; and such a finding is not "so contrary to the overwhelming weight of the evidence as to be clearly wrong." *See Eagle Oil & Gas Co.*, 549 S.W.3d at 269. The jury's finding must stand.

II. Mehta does not challenge the sufficiency of the evidence constituting breach of fiduciary duty.

Partnership formation predicated the breach of fiduciary duty question. C.R. 3508–21. Tellingly, if a fiduciary duty is found to exist, Mehta does not deny that he breached it. Mehta's only factual challenge to the jury's award of $1,000,000 in damages for breach of fiduciary duty is that there was no partnership. Because the jury's partnership finding is supported by the record, the jury's breach of fiduciary duty answer is necessarily supported.

III. No basis exists to disturb the jury's unjust enrichment finding.

The jury awarded $586,000 for unjust enrichment, which, as discussed below, approximates Ahmed's 35% share of the income stream.[4] C.R. 3508–21.

Unjust enrichment is an independent cause of action. *See Eun Bok Lee v. Ho Chang Lee*, 411 S.W.3d 95, 111 (Tex. App.—Houston [1st Dist.] 2013, no pet.). "Unjust enrichment occurs when a person has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain." *Eun Bok Lee*, 411 S.W.3d at 111. "A party may recover under an unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of undue advantage." *Id.* (citing *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)).

A. The evidence supports the finding that Mehta wrongly secured a benefit through illicit means.

The jury considered the totality of the evidence, made reasonable inferences, and concluded Mehta had received a benefit through "fraud, duress, or the taking of undue advantage." *Id.*; *see also Lozano*, 52 S.W.3d at 148 ("If circumstantial evidence will support more than one reasonable

[4] *See infra* Part V.C (explaining the basis for the calculation).

inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient."). This finding is supported by the record.

Mehta did not have the cash when he contacted Ahmed. 4 R.R. 48:13–49:23; 5 R.R. 242:13–17; Pl's. Ex. 9. By misleading Ahmed and committing him to the partnership, Mehta guaranteed himself of a way to close irrespective of whether he was ultimately able to secure other financing—this is a benefit to Mehta. Indeed, it was only weeks later that Mehta was able to assemble funding from multiple sources. 6 R.R. 79:8–80:12.

Furthermore, Mehta's attempt to cover-up the letter and his request for Ms. McInnes to lie substantiates that Mehta knew he wrongfully obtained, used, and benefited from the letter. *See* 4 R.R. 86:4–87:16. Mehta ignores these facts and the benefits that were provided to him by Ahmed. The jury could conclude that Mehta should not reap benefits from his deception.

The timing of events further supports the conclusion that Mehta's acquisition of the Community Bank proof-of-funds letter was beneficial. Prior to submitting his second bid (which was based on bank financing), *see* Pl.'s Ex. 13, Mehta sent his personal financial statement from Community

Bank to the seller showing that he only had about $1,200,000 in available cash. Pl.'s Ex. 9. Mehta's liquidity (or lack thereof) was not an issue at that point because Mehta assumed he would secure bank financing.

The broker informed Mehta that the long closing associated with bank financing in his second offer would lose him the deal. 5 R.R. 160:17–162:16. This put Mehta in a bind because Mehta lacked the cash and had recently disclosed this fact to the seller. *See* Pl.'s Ex. 9 (sending the financial statement). Mehta then made a cash offer. *See* Pl.'s Ex. 15.

The same day Mehta made a cash offer, Mehta and Ahmed began firming up details of the partnership. 6 R.R. 104:24–107:11. Mehta's agreement with Ahmed provided Mehta with a committed source of financing and allowed Mehta to procure the Community Bank letter, which provided Mehta a means of demonstrating to the seller the he could close—all benefits to Mehta.

Furthermore, Mehta completed the property tour on July 3. 5 R.R. 171:16–18. Mehta submitted the letter to the broker (who in turn provided it to the seller) on July 5. Pl.'s Exs. 22 and 23. Mehta was formally awarded the property only **after** submitting the letter. 5 R.R. 179:7–18. Given that the seller did not inform Mehta immediately after the property tour that the

seller had chosen Mehta, and did not inform Mehta that he had won the bid until after receiving the letter, the jury could reasonably infer and conclude that the letter had some impact on the deal and benefitted Mehta. *See Primoris Energy Corp. v. Myers*, 569 S.W.3d 745, 757 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (holding that the evidence supported a reasonable inference and discussing that "choosing 'among opposing reasonable inferences' is a determination for the jury, which is 'entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe'") (quoting *Lozano*, 52 S.W.3d at 149).

In addition, even after Mehta was informed that the owner was moving forward with him, the deal would not be final until Mehta signed the paperwork. *See* Defs.' Ex. 38 (noting that "until such time as seller and purchaser fully execute the agreement and it is binding, either party may withdraw its interest in the transaction."). After submitting the Community Bank letter Mehta never updated the seller as to his source of funds. *See* 7 R.R. 65:3–17. Thus, even during the later period of the transaction, the Community Bank letter provided a continuing benefit to Mehta by leading

the seller to believe incorrectly that Mehta had $10,000,000 in cash at Community Bank.

Mehta recognizes that a proper inference is that the letter had some benefit, given that Mehta urges that "the broker didn't really consider it." Such an assertion acknowledges, correctly, that the timing of events allows for a reasonable inference that the letter played some role. *Lozano*, 52 S.W.3d at 148 (discussing inferences that the jury can draw). Although Mehta now tries to downplay the importance of the letter, the jury certainly appreciated the desperate, urgent steps that Mehta took to acquire it, including Mehta's request that Mr. McInnes lie in the letter about his assets, and Mehta's later attempt to conceal the letter, including the extraordinary step, after litigation had been filed, of asking Ms. McInnes to conceal it. 4 R.R. 86:4–87:16.

Mehta misconstrues the record in attempting to minimize the letter's importance. Mehta states that "neither the broker nor the seller had specifically asked Mehta to submit the Community Bank letter." Appellants' Br. at 51. That is wrong. The broker "recommended [] in the Refinement Letter that he provide audited statements or proof of funds." 5 R.R. 215:11–16; Pl.'s Ex. 6. Mehta did not provide audited financials, 5 R.R. 247:3–10, or bank statements, 5 R.R. 235:12–24, and his personal financial statement,

showing only $1,200,000 in available cash, was certainly not proof of funds. *See* Pl.'s Ex. 9.

Mehta also faults Ahmed's counsel for not asking "point blank" the speculative question whether the broker would have recommended Mehta in the absence of the letter. This argument misses the point. The seller made the final decision, not the broker. The broker's recommendation may have had some sway but is not the equivalent of a final decision from the seller. The record is devoid of conclusive proof that the letter had no impact *on the seller*.[5] Certainly, the seller expressly requested proof of funds and Mehta intended it to have an impact when he sent it.

In sum, legally sufficient evidence, and the reasonable inferences from that evidence, supports the jury's conclusion. *Lozano*, 52 S.W.3d at 148. Moreover, given the evidence, nothing in the record conclusively establishes

[5] Mehta's counsel attempted to elicit testimony from the broker about whether the seller placed any weight on the letter and these questions were met with objections that were sustained and are unchallenged. 5 R.R. 214:18–215:10. In any event, the broker could not testify about what weight the seller placed on the letter because she did not have personal knowledge regarding what seller thought, could not testify about the seller's state of mind, *see, e.g.*, *Lehman v. Corpus Christi Nat'l Bank*, 668 S.W.2d 687, 689 (Tex. 1984) ("[A] witness cannot testify to the state of mind of another person."), nor could she testify as to what the seller said. *See e.g., See NL Well Service/NL Indus., Inc. v. Flake Indus. Servs., Inc.*, 656 S.W.2d 584, 568 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (noting that "hearsay has no probative value, even if admitted without objection. It can never form the basis of a judgment because it is wholly incompetent").

that this letter was of no consequence or of no benefit at all, as Mehta suggests. *See Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018) (noting that "evidence is legally insufficient to support a jury finding when . . . the evidence establishes conclusively the opposite of a vital fact.").

Finally, in passing, Mehta also mischaracterizes the damages awarded as "restitution" (though later properly recognizes that the remedy was disgorgement), then wrongly argues that because Ahmed did not contribute to the partnership he is not entitled to damages. Mehta, however, cites no case for this proposition. Looking past that defect, the remedy here was not "restitution" but, rather, disgorgement of the benefits wrongly received, which, as discussed below, is proper. *See City of Harker Heights, Tex. v. Sun Meadows Land, Ltd.*, 830 S.W.2d 313, 317 (Tex. App.—Austin 1992, no writ) (discussing that the goal of unjust enrichment is to "forc[e] the defendant to disgorge benefits that it would be unjust to keep, rather than on compensating the plaintiff.").

B. The damages awarded for unjust enrichment are not dependent on the existence of a partnership.

Mehta challenges the damages awarded for unjust enrichment by arguing that "without an existing partnership, Ahmed cannot recover any

disgorgement of profits." Appellants' Br. at 54. As discussed above, the jury's partnership finding is proper, so this argument is irrelevant.

In any event, Mehta improperly treats the existence of a fiduciary duty as prerequisite to a disgorgement remedy. *See* Appellees' Br. at 55. The Texas Supreme Court rejected this very argument. In *Southwestern Energy Production Company,* the court reversed an appellate court's vacatur of disgorgement based on the rationale that no fiduciary duty existed under the agreements at issue, and held that "while equitable disgorgement is a viable remedy for breach of trust by a fiduciary, *we have never expressly limited the remedy to fiduciary relationships* nor foreclosed equitable relief for breach of trust in other types of confidential relationships." *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 729 (Tex. 2016) (internal citations omitted). The Texas Supreme Court has expressly left open the question of disgorgement even without a fiduciary relationship. *Id.* (discussing that it did not need to address whether disgorgement was equitable because that was an issue to "be determined anew on remand" in light of the court's rulings). Here, disgorgement is certainly equitable, particularly given Mehta's conduct and artifice.

IV. While the Court does not need to address fraud, Mehta's attempt to set aside the fraud finding fails.

If this Court affirms the jury's verdict on Ahmed's breach of fiduciary duty and unjust enrichment claims, then it need not address the fraud issues. In any event, Mehta's arguments lack merit.

A. The record supports finding that Mehta's fraud caused damages.

Mehta does not make a serious challenge to causation, devoting just one paragraph to this issue. *See* Appellants' Br. at 57. Mehta's entire challenge is based on the incorrect assertion that "the decision to sell the Mall to Mehta had been made five days before the Community Bank letter was even written." *See* Appellants' Br. at 57. As discussed above, this argument overstates the record. The evidence establishes (i) the seller had audited requested financials and proof of funds, 5 R.R. 215:11–16; (ii) Mehta provided no audited financials but did disclose that he had only $1,200,000 in cash, 4 R.R. 48:13–49:23; 5 R.R. 242:13–17; (iii) Mehta backed himself into a corner by making a cash offer despite disclosing that lacked the cash, *see* Pl.'s Ex. 9; (iv) Mehta wrongfully procured the Community Bank letter and sent it to the seller to induce it to accept his offer; and (v) Mehta was only formally and finally awarded the West Oaks Mall **after** submitting the letter.

5 R.R. 179:7–18. And the seller could have backed out any time prior to closing, and, as such, the letter provided a continuing benefit. *See* Defs.' Ex. 38. Although necessarily speculative to question as to what the seller would have done if Mehta had honestly disclosed his financial condition to the seller, or corrected the understanding reflected in the Community bank letter, causation may be reasonably inferred under this record. *Lozano*, 52 S.W.3d at 148.

Mehta's argument is also a non-sequitur. The weight the seller placed on the letter does not change the fact that Mehta deceived Ahmed about being partners, wrongfully acquired the letter based on those lies, and dumped Ahmed when convenient. This is classic fraud.

B. The fact that partners have no obligation to remain partners does not negate as a matter of law any element of Ahmed's fraud claim.

Mehta wrongly attempts to analogize a partnership to the employment context, and then reasons that, as a matter of law, Mehta's false statements to Ahmed cannot support fraud.

Partnerships have unique attributes readily distinguishing them from the employer/employee relationship. For starters, a partnership is not fully terminated upon one party unilaterally withdrawing from the partnership.

Rather, untangling a partnership "consists of three distinct steps: dissolution, the winding up of partnership affairs, and termination." *See Kronoz Int'l, S.A. v. Alvarez*, No. 4:13-cv-1262, 2015 WL 12570831, at *5 (S.D. Tex. March 10, 2016). Partners continue to owe each other fiduciary duties through the first two phases. *See M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617, 618 (Tex. 1995). Thus, while partners have no duty to remain bound as partners forever, *see Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546 (Tex. 1998), simply declaring a partnership over does not terminate the duties owed.

Once a partnership is formed, partners (or former partners) continue to owe each other fiduciary duties as to *existing* partnership opportunities after termination—even ones that have not fully blossomed. *See Maykus v. First City Realty & Fin. Corp.*, 518 S.W.2d 887, 893 (Tex. App.—Dallas 1974, no pet.). As one court explained, "although both parties may have [] power to withdraw from the venture at any time," one party cannot "violate his duty of loyalty and good faith by secretly dealing in his own interest with property which the parties had agreed to acquire and contribute to the venture." *Id.* In *Maykus*, the court found one partner liable to another, even after the relationship ceased because, "while [defendant] might have been

able to relieve himself of any *future* fiduciary obligation by withdrawing from the venture . . . he could not, by so doing, gain any advantage for himself in breach of his duty of loyalty and good faith." *Id.* (emphasis added).

Other courts have reached this same conclusion. *See Leff v. Gunter*, 658 P.2d 740, 746 (Cal. 1983); *Fouchek v. Janick*, 225 P.2d 783, 793 (Or. 1950). As one court eloquently stated:

> The true rule is this: When a partner wrongfully snatches a seed of opportunity from the granary of his firm, he cannot, thereafter, excuse himself from sharing with his copartners the fruits of its planting, even though the harvest occurs after they have terminated their association.

Foucheck, 225 P.2d at 793.

A terminable at will partnership simply reflects the noncontroversial concept that there is no obligation to *remain* partners. But duties continue to exist both during and after termination, especially as to identified or existing opportunities.

Mehta disregards this authority, ignores how partnerships function, and attempts to apply rules from the employment context.[6] But the rule

[6] Mehta implies that *Gregan v. Kelley*, 355 S.W.3d 223 (Tex. App.—Houston [1st Dist.] 2011, no pet.) is some support for treating a partnership the same as an employment

about fraud in the employment context is based on policy reasons that have no application to partnerships. The Texas Supreme Court explained that allowing a fraud claim to be based on "a promise that is contingent on continued at-will employment . . . would significantly impair the at-will rule. An employee who could not show consideration for an enforceable contract could simply sue for fraud and recover not only the same actual damages but punitive damages as well." *See Sawyer v. E.I. Du Pont De Nemours & Co.*, 430 S.W.3d 396, 401–02 (Tex. 2014). No cogent reason exists to extend this policy rationale to the partnership context.

Furthermore, comparing and contrasting a partnership with the employer/employee relationship leaves no doubt that they are not analogous. A routine employee can walk into work one morning and be gone that afternoon, and neither the employer nor employee owe each other a thing thereafter. But that is not the case for a partnership. Far more serious and significant consequences attach to being partners. In particular, in a

relationship. While the plaintiff's petition in *Gregan* alleged a partnership, "this claim was not submitted to the jury." The court in *Gregan*, accordingly, discussed that for "purposes of [the] appeal, then, there was no partnership agreement between the parties, and, by extension, no formal fiduciary relationship based on any such partnership." *Gregan*, therefore, was a run-of-the-mill employment case.

partnership, duties continue after parties decide to part ways. *See Maykus*, 518 S.W.2d at 893; *Kronoz Int'l, S.A.*, 2015 WL 12570831 at *5.

A representation to be partners carries significant consequences. Partners owe duties both during and after the partnership. Therefore, representations about being partners are not "illusory," as Mehta argues, and, as such, can be material for purposes of fraud. Likewise, a person can justifiably rely on statements about being partners for purposes of fraud.

Mehta asks this Court to create a novel, bright line rule that there can be never fraud or fraudulent inducement as to partnerships. Mehta, however, provides no justification for creating such a rule. Given the unique nature of partnerships, this Court should decline the invitation.

In any fraud case, the facts and circumstances may indicate that reliance on a promise was not reasonable or justified as a matter of fact, or that factually a statement was not material. *See e.g.*, *Gulf Liquids New River Project, LLC v. Gulsby Eng'g, Inc.*, 356 S.W.3d 54, 72–74 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd). That, however, is not Mehta's argument. Instead, Mehta is arguing that as a matter of law, given the nature of a partnership, there can be no justifiable reliance. Mehta is wrong.

C. Mehta's arguments regarding fraud damages are misplaced.

Mehta also makes several arguments regarding fraud damages. None have merit.

1. *Benefit-of-the bargain damages are available.*

In arguing that benefit-of-the bargain damages are not available, Mehta makes the same misplaced arguments and relies on the same inapplicable cases as he did in arguing that any representations were not material or there can be no justifiable reliance.[7]

No serious dispute exists that benefit-of-the bargain damages are available for fraudulent inducement. *See Anderson v. Durant*, 550 S.W.3d 605, 614–15 (Tex. 2018); *Zorilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 154 (Tex. 2015). And, as discussed above, no basis to apply the limited rules relating the employment context exist here.[8] Benefit-of-the bargain damages are available.

2. *This case does not fall within the Statute of Frauds.*

Mehta's arguments that the Statute of Frauds impacts Ahmed's fraud claim is foreclosed by precedent from this Court. *Sewing*, 371 S.W.3d at 330. This Court explained, "[a]n agreement to share in the profits of

[7] *See supra* Part IV.B.
[8] *See id.*

contemplated speculative deals in real estate simply does not involve the transfer of real estate, or an interest in real estate, within the meaning of the Statute of Frauds." *Sewing*, 371 S.W.3d at 330. "Merely because a partnership agreement contemplates transactions in real estate does not transform the partnership itself into a transaction for the sale of real estate, brining it within the Statute of Frauds." *Id.*; *see also Palmer v. J.B. Fuqua*, 641 F.2d 1146, 1159 (5th Cir. 1981) ("A contract between two persons to go into business of buying and selling real estate as partners or as joint adventurers, sharing the profits and losses thereof, is not with section 4 (of the Statute of Frauds) unless there is a provision for the transfer of a specific land from one party to another.").

In *Sewing*, the court of appeals found that the parties had entered into a partnership regarding certain properties, and a claim regarding a partnership interest, though related to real estate, was not barred by the Statute of Frauds. *Id.* Likewise, the Fourteenth Court of Appeals, though considering whether the agreement could be performed within a year, found that an oral partnership agreement to eventually acquire a restaurant was not within the Statute of Frauds. *See Chacko v. Mathew*, No. 14-07-00613-cv, 2008 WL 2390486, at *4 (Tex. App.—Houston [14th Dist.] June 12, 2008, pet.

denied) (finding that oral partnership agreement to acquire a restaurant was not foreclosed by the Statute of Frauds).

Here, the jury properly awarded Ahmed the value of his "partnership interest." In this instance, because the partnership had only one asset, Ahmed's interest coincides with the value of the West Oaks Mall opportunity. But merely because the partnership had identified opportunity, which happened to include real property, did not transform this case into one falling within the Statute of Frauds.

Mehta's reliance on *Bakke Development Corp. v. Albin*, No. 04-15-00008, 2016 WL 6088980 (Tex. App.—San Antonio Oct. 19, 2016, no pet.) is misplaced. In *Bakke Development*, the defendant and plaintiff independently owned property prior to discussing becoming partners. *Id.* at *1. Both parties were to contribute their real property to the partnership. *Id.* When the defendant backed out, plaintiff sued for an interest in the defendant's property that was to be contributed to the partnership. The subject matter of *Bakke* was ultimately to enforce an oral agreement for a conveyance of real property. *Id.*

This case presents a fundamentally different scenario. The West Oaks Mall is a wrongfully-usurped partnership opportunity. The parties were

going to jointly acquire, develop, and operate it. Ahmed requested and was awarded damages related to his lost interest. C.R. 3508–21.

Furthermore, Mehta's emphasis on the fact that Ahmed filed a lis pendens is a red herring. Ahmed had four causes of action, including a claim for a constructive trust.[9] Ahmed's request for imposition of a constructive trust would be a claim sufficient to support a lis pendens and, notably, is a recognized exception to the Statute of Frauds. *See Ginther v. Taub*, 675 S.W.2d 724, 728 (Tex. 1984); *Pickelner v. Adler*, 229 S.W.3d 516, 527 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). But the pleading of this alternate claim does not mean that Ahmed's fraud claim and request for fraud damages is also within the Statute of Frauds.

Ahmed's fraud theory properly sought money damages related to Mehta's fraud, and the measure of damages was Ahmed's 35% interest in the partnership. Under *Sewing*, this is not a claim for an interest in real property within the Statute of Frauds.

[9] Ahmed dismissed his claim for declaratory judgment prior to trial.

3. *Ahmed's damage model is sound.*

Ahmed's damage model for fraud represents the value of his partnership interest. Mehta argues that because the partnership owned nothing as of July 17th, that Ahmed's damages were zero. But Ahmed is entitled to damages that are causally linked to Mehta's fraud. Ahmed was fraudulently induced into forming a partnership with Mehta to acquire and develop the West Oaks Mall and was deprived of a partnership interest therein through Mehta's fraud. The damage model represents the value of what was promised (e.g., a 35% interest in the partnership) versus the value of what was received (e.g., nothing). This is a proper measure of damages.

Mehta's argument is a variation on a theme running through his entire brief that is legally untenable: Mehta claims that he is absolved of wronging, even after committing misdeeds, because he terminated the partnership prior to the closing of the West Oaks Mall.[10]

4. *Judgment for both fraud and unjust enrichment would be proper.*

Mehta also briefly argues that if the Court reverses the partnership finding and affirms the fraud finding, that Ahmed would have to elect between fraud and unjust enrichment damages. Mehta makes this same

[10] *See supra* Part IV.B.

argument as to breach of fiduciary duty and unjust enrichment in Part II of his brief. Mehta is wrong.[11]

The test for compliance with the one satisfaction rule is whether the damages awarded serve different purposes. *See Saden v. Smith*, 415 S.W.3d 450, 465 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). The damages for unjust enrichment and fraud serve different purposes. The goal of unjust enrichment is to "forc[e] the defendant to disgorge benefits that it would be unjust to keep, rather than on compensating the plaintiff." *See City of Harker Heights*, 830 S.W.2d at 317 (Tex. App.—Austin 1992, no writ); *see also e.g.*, *Allstate Ins. Co. v. Receivable Fin. Co., LLC*, 501 F.3d 398, 413 (5th Cir. 2007) ("Disgorgement wrests ill-gotten gains from the hands of a wrongdoer. It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs."). Fraud damages, like any tort damages, are about compensating plaintiff for his damages. *See, e.g.*, *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998).[12] Because these damages serve different purposes, they can both be awarded.

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[11] *See infra* Part V.C.

[12] Mehta improperly conflates the fact that the jury awarded the same numerical figure for fraud and unjust enrichment. But that is not the test.

D. The fraud question is correct because Mehta's representations gave rise to a duty to disclose his true intent.

Mehta's argument that the fraud question is flawed can be readily disposed of because the Texas Supreme Court has recognized that there is "a duty to disclose when the defendant: (1) discovered new information that made its earlier representation untrue or misleading; (2) made a partial disclosure that created a false impression; or (3) voluntarily disclosed some information, creating a duty to disclose the whole truth." *See Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 220 (Tex. 2019); *see also Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (discussing instances when a duty will arise in the fraud by nondisclosure context).

Mehta wrongly argues that there is a duty to disclose only in a fiduciary or confidential relationship, and reasons that without a partnership finding, there was no duty to disclose. Texas Supreme Court precedent plainly demonstrates that Mehta's premise is wrong: other situations, which are applicable here, can give rise to a duty to disclose.

Once Mehta represented that he was going to be partners with Ahmed, Mehta had a duty to reveal to Ahmed his true intent. Mehta had many

opportunities to set the record straight, but he did not until after he secured the Community Bank letter and other financing.

V. Mehta's legal challenges to damages in Part II are misplaced.

In Part II of his brief, Mehta makes a series of legal challenges to the damages award. Mehta, however, provides no basis to disturb the Final Judgment.

A. Mehta again misconstrues what it means for a partnership to be terminable-at-will, which does not bar the damages awarded for breach of fiduciary duty.

As explained above, the fact that a partnership is "at-will" means only that there is no obligation to remain partners, *see Bohatch*, 977 S.W.2d at 546; it does not mean that a partner can declare the relationship over and usurp identified partnership opportunities. *See Maykus*, 518 S.W.2d at 893. In other words, once a partnership is formed, one partner cannot steal then-existing partnership opportunities, even after termination. *See Maykus*, 518 S.W.2d at 893.

Just because Mehta declared the partnership over before the closing of the West Oaks Mall does not give him license to acquire it for himself. *See id.* The West Oaks Mall was an identified partnership opportunity. Mehta's breach of fiduciary duty allows for the damages awarded. *See e.g.*, *Saden*, 415

S.W.3d at 466 (discussing actual damages awarded for breach of fiduciary duty); *Lesikar v. Rappeport*, 33 S.W.3d 282, 305 (Tex. App.—Texarkana 2000, pet. denied). And the proper measure of damages is measured by what Ahmed was cheated out of—his 35% interest in a partnership that owned the West Oaks Mall.

B. The partnership finding does not preclude an unjust enrichment claim.

The rule that a party cannot recover under unjust enrichment if an express contract exists is inapplicable here. The rule's purpose is to prevent a party from rewriting contractual terms through an equitable doctrine. *See Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 683–85 (Tex. 2000). "[E]quitable theories should not be permitted to allow a recovery '*inconsistent* with the express agreement.'" *Norhill Energy LLC v. McDaniel*, 517 S.W.3d 910, 919 (Tex. App.—Fort Worth 2017, pet. denied) (emphasis added) (quoting *Fortune Production Co.*, 52 S.W.3d at 684). If a party seeks relief consistent with a contract, then recovery under an equitable theory is permissible. *Id.* at 918–19 (holding that recovery under an equitable theory was proper because the plaintiff "did not seek to vary the terms of the express agreement between the parties").

Ahmed is not seeking to rewrite the terms of the partnership. The unjust enrichment measure of damages represents Ahmed's 35% share of the present value of the income stream.[13] This measure of damages is entirely consistent with the terms of the partnership agreement. A partnership finding is not a bar to recovery of damages for unjust enrichment.

Furthermore, the general rule that a party cannot recover under an equitable theory if an express contract exists is riddled with exceptions. The common theme among the exceptions is that if a party partially performed and could have completely performed but for the other party's actions, equity requires the disgorgement of the benefits to the breaching party—which is essentially what occurred here. *See, e.g.*, *Truly v. Austin*, 744 S.W.2d 934, 936–37 (Tex. 1988) (discussing the general rule that a contract bars quasi-contractual theories in the context of quantum meruit and noting the various exceptions); *Fortune Production Co.*, 52 S.W.3d at 684; *Pepi Cor. v. Galliford*, 254 S.W.3d 457, 462–63 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

Ahmed provided Mehta with the Community Bank letter based on Mehta's representations that they were partners and committed to

[13] *See infra* Part V.C.

contribute the required cash to the partnership. 6 R.R. 107:8–11; 6 R.R. 139:4–16; 6 R.R. 209:8–21. Mehta's illicit actions prevented Ahmed from doing so. Ultimately, the jury found that Mehta's actions were wrongful and that it would be fundamentally unfair for Mehta to keep all the profits from the West Oaks Mall for himself. This is a classic unjust enrichment scenario and is not barred by the fact that the parties formed a partnership.

The reprehensible nature of Mehta's conduct is amplified by the fact that the parties formed a partnership. The existence of a partnership imposed on Mehta a heightened standard of care, or "not honesty alone, but the punctilio of an honor the most sensitive." *See, e.g.*, *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 560–61 (Tex. 2006).

C. The Final Judgment does not violate the one satisfaction rule.

The Final Judgment does not run afoul of the one satisfaction rule. C.R. 3634–35. The resolution of this issue turns on whether Mehta's actions gave rise to two different injuries resulting in distinct damages. *See Saden*, 415 S.W.3d at 465 ("[A] judgment awarding damages on each alternate theory may be upheld if the theories depend on separate and distinct injuries and if separate and distinct damages findings are made as to each theory."). They did.

Saden is instructive in this regard. In *Saden*, the court considered a judgment awarding damages for breach of contract, breach of fiduciary duty, and equitable disgorgement of profits. *Id.* The court found that the actual damages (i.e., lost profits) awarded for breach of contract and fiduciary duty were effectively the same. *Id.* at 468. The court, however, reached a different conclusion as to disgorgement which, notably, was also measured as "profit." *Id.* at 469. The court reasoned that "equitable disgorgement is distinguishable from an award of actual damages in that it serves a separate function of protecting fiduciary relationships." *Id.* The court held that recovery of actual damages (measured by "lost profits") and the equitable disgorgement of profits did not violate the one satisfaction rule because they served different purposes.

Applying *Saden*'s reasoning, the Final Judgment is proper. C.R. 3634 35. Here, unjust enrichment and breach of fiduciary duty serve two different purposes. Breach of fiduciary duty damages seek to compensate Ahmed for the actual damages Mehta inflicted. *See e.g.*, *Avila v. Havana Painting Co., Inc.*, 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (awarding actual damages for the tort of breach of fiduciary duty). In contrast, the focus of unjust enrichment is "on forcing the defendant to

disgorge benefits that it would be unjust to keep, rather than on compensating the plaintiff." *See City of Harker Heights, Tex.*, 830 S.W.2d at 317; *see also, e.g.*, *Allstate Ins.*, 501 F.3d at 413 ("Disgorgement wrests ill-gotten gains from the hands of a wrongdoer. It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs."); *see also e.g.*, *Dernick Res., Inc. v. Wilstein*, No. 01-13-00853-cv, 2014 WL 4088150, at *4 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (comparing actual damages with the remedy of fee forfeiture). Because these causes of actions and the remedies serve two different purposes, awarding damages for both does not violate the one satisfaction rule.

Furthermore, the damages awarded under each jury question are different. C.R. 3508–21. Ahmed's expert, Matt Deal, testified regarding (i) the underlying land value of the West Oaks Mall and (ii) the income stream. 5 R.R. 63:22–66:19. Mr. Deal characterized the income stream as "a bonus above the land" and testified that the present value of the income stream over five years was $1,676,079. *Id.* Ahmed's 35% share of the income is $586,627.30, or, when rounded, the $586,000 awarded. C.R. 3508–21. Thus, these damages represent the jury's conclusion that Mehta would be unjustly

enriched by keeping the full value of the profits and that he should be forced to relinquish Ahmed's share.

In contrast, the damages the jury awarded to Ahmed for breach of fiduciary duty closely approximate Ahmed's share of the difference in the value of the land minus the price paid. 5 R.R. 64:3–7 (testifying that the "Land [is] $13,069,150").[14] This is an entirely different measure of damages. The damages awarded for breach of fiduciary duty and for unjust enrichment do not overlap.

Conclusion

Ahmed and other witnesses described one set of events; Mehta denied everything. After sitting through four days of testimony and evaluating the witnesses' credibility, the jury believed Ahmed. The jury concluded, based on all the evidence, that the parties formed a partnership to acquire and develop the West Oaks Mall, that Mehta breached his duties, and, further, that Mehta was unjustly enriched through his actions.

[14] 35% of $3,069,150 (the land value minus what was paid) is $1,074,202.50.

The Final Judgment awarding damages for breach of fiduciary duty and unjust enrichment is supported by the record, and no legal basis exists to disturb it. This Court should affirm the judgment in all respects.

Dated: June 28, 2021.

Respectfully submitted,

By: */s/ Peter Scaff*

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